

STATE OF MICHIGAN  
COURT OF APPEALS

---

BETH C. MATTER,

Plaintiff-Appellee,

V

RICHARD C. MATTER,

Defendant-Appellant.

---

UNPUBLISHED

January 20, 2011

No. 293421

Oakland Circuit Court

LC No. 2005-708339-DO

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent.

A trial court's award of spousal support is reviewed for an abuse of discretion which occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Woodington v Shokoohi*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010) (Docket No. 288923), slip op p 1. "The trial court's findings of fact relating to an award of spousal support are reviewed for clear error." *Id.* The trial court's factual findings will not be reversed unless they are clearly erroneous. *Id.* at slip op p 2. "Special deference is given to the trial court's findings when they are based on the credibility of the witnesses." *Id.* In the present case, the judgment of divorce incorporated a settlement agreement, reached as a result of meeting with mediator Hanley Gurwin. Judgments entered into pursuant to a settlement agreement constitute a contract and are to be construed and applied in accordance with the rules governing contract law. *In re Lobaina Estate*, 267 Mich App 415, 418; 705 NW2d 34 (2005). A contract is not rendered ambiguous when a relevant term is not defined in the contract. *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002). When a term is not defined in the contract, it will be interpreted in accordance with its commonly used meaning. *Id.* at 76-77.

In the present case, defendant was employed by William Beaumont Hospital for an extensive period of time. However, within two months of the entry of the judgment of divorce, defendant left the state and obtained employment with a surgical association. At the evidentiary hearing, defendant readily admitted that he could have remained an employee of the association. However, after a year, he entered into a shareholder agreement to join an entity which purchased medical equipment, and this entity, in turn, leased the equipment to defendant's medical association. Defendant contended that the returns earned from the leasing entity were not included in the calculation of spousal support, but constituted investment income. Additionally,

defendant offered expert testimony that, for purposes of the Internal Revenue Code (IRC), the revenue generated from the leasing entity constituted investment income.

On the contrary, plaintiff testified that, during settlement negotiations, Gurwin made inquiry regarding defendant's intention of leaving William Beaumont Hospital and moving to Kentucky. Plaintiff entered into the settlement agreement after learning that the opportunity to move to Kentucky had passed and that defendant would remain with William Beaumont Hospital.

Although the divorce judgment excluded investment income from the calculation of spousal support, the term "investment income" was not defined in the agreement. Consequently, when faced with interpreting the term, the trial court rejected the testimony by defendant and his expert. Specifically, the trial court held that the term "income" should be interpreted in accordance with the Michigan Child Support Formula:

Although the disputed portion of Defendant's earnings may be properly characterized as passive or investment income for purposes of the Internal Revenue Code, the Court believes these earnings are more properly characterized as gross earnings from all employment sources as set forth in the Judgment for calculating spousal support. The Michigan Child Support Formula [MCSF], although inapplicable in this case, is instructive for determining what constitutes income. Pursuant to 2008 MCSF 2.01(C)(2), income includes "earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals. Furthermore, 2.01(C)(5) provides that income includes "... interest, dividends ... to the extent that they represent regular income or may be used to generate regular income."

It was established, through Defendant's own testimony, that he chose to become a shareholder of USA and therefore was required to acquire a membership interest of ROA pursuant to USA's operating agreement. Defendant could have chosen to remain an employee of USA as opposed to a shareholder. The Court suspects Defendant chose to become a shareholder in order to attempt to shield a portion of his income from spousal support consideration. His reluctance to produce his financial information as required by the Judgment coupled with the timing of the change of his employment, gives the Court reason to believe he was not exactly forthcoming about his true intentions with respect to his employment as suspected by Plaintiff. The income at issue may be passive or interest income for tax purposes, but it was realized by Defendant solely as a result of his employment with USA. Although the USA and ROA entities may be structured so as to comply with Stark Regulations, these are not publicly traded stocks that an individual outside of USA and its related entities could purchase on the open market. In other words, the income reported on Defendant's 1099 and K-1s would not have been available to him if he were not affiliated with USA and are therefore properly considered as gross earnings from his employment.

\*\*\*

Defendant correctly points out that divorce judgments are contractual in nature. *Holmes v. Holmes*, 281 Mich App 575[;] 760 NW2d 300 (2008). However, good faith and fair dealing are implied promises contained in every contract and neither party shall do anything negatively affecting the rights of the other party to receive the fruits of the contract. *Hammond v. United of Oakland, Inc.*, 193 Mich App 146, 151-152[;] 483 NW2d 652 (1992) (internal quotations and citation omitted). The Court does not believe Defendant acted in good faith in negotiating the terms of the Judgment. Although Defendant claims that it was necessary for him to seek new employment almost immediately after the parties were divorced, his actions caused Plaintiff to lose her interest in his SERP plan at Beaumont and possibly thousands of dollars of spousal support.

In the present case, the term “investment income” was not defined in the parties’ settlement agreement. Consequently, defendant and his expert asserted that the medical equipment leasing entity revenues did not constitute income for purposes of the spousal support calculation, but rather, was in accordance with the IRC definition of investment income. However, the trial court found that, under the facts and circumstances of this case, investment income was appropriately defined in accordance with the MCSF. In reaching this holding, the trial court found that defendant did not have to join the leasing entity, but rather, did so in an attempt to circumvent the inclusion of this revenue in calculating spousal support. The trial court also implicitly found that defendant made misrepresentations during the settlement negotiations, citing to the proximity of the departure from William Beaumont Hospital and his failure to provide his financial information. Indeed, although defendant complains that plaintiff has no documentary evidence to support her contention that defendant made representations regarding his employment status with William Beaumont Hospital, she was permitted to testify that she obtained this information from Gurwin without objection. Curiously, defendant did not call Gurwin as a witness at the evidentiary hearing to support his testimony. Unlike defendant, the trial court did not question the veracity of plaintiff’s testimony. See *Woodington*, slip op p 2. On this record, I cannot conclude that the trial court’s clearly erred in its application of the factual findings to the facts and circumstances of this case. *Id.* Therefore, I would affirm the trial court.

/s/ Karen M. Fort Hood